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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MISSOURIANS FOR TAX JUSTICE EDUCATION PROJECT, INC., a corporation; MISSOURI ASSOCIATION FOR SOCIAL WELFARE, a corporation; LARRY C. GAINES; and LAVONNE J. SHINN,

Petitioners,

v.

BOB HOLDEN, State Treasurer; MEL CARNAHAN, Governor; JANETTE M. LOHMAN, Director, Department of Revenue; RICHARD A. HANSON, Commissioner of Administration; and STATE OF MISSOURI,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Article X, §18(a) of the Missouri constitution establishes a limit on the total state revenues which the state may receive from many sources, and spend in each fiscal year, in order "to rein in increases in governmental revenue and expenditures." Section 18(b) requires that excess revenues be "refunded pro rata based on the Missouri state income tax . . . annual returns" filed after the fiscal year. Total state revenues for fiscal year 1995 exceeded the limit, triggering this "refund" requirement. Petitioners, who paid no income tax but paid sales taxes and other taxes, challenged this "refund" requirement as a violation of the Equal Protection Clause of the Fourteenth Amendment. The Questions Presented are:

1. Did the supreme court of Missouri in fact apply the Equal Protection standard of review, established by this Court, when it simply determined that the constitutional requirement to distribute the excess revenue to income taxpayers is rationally related to the state's purpose, without considering whether the distinction made by §18(b) between income taxpayers and all other persons furthers the stated purpose?

2. By limiting the "refunds" to income taxpayers, does §18(b) further the state's purpose "to rein in increases in governmental revenue and expenditures," and thereby satisfy the requirement of the Equal Protection Clause?

LIST OF PARTIES

All parties are listed on the cover. All petitioners were plaintiffs and appellants below. All respondents were defendants and respondents below.

RULE 29.6 LIST

There are no parent companies or nonwholly owned subsidiaries of either corporate petitioner.

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Missourians for Tax Justice Education Project, Inc., Missouri Association for Social Welfare, Larry C. Gaines, and Lavonne J. Shinn respectfully petition for a writ of certiorari to review the judgment of the supreme court of Missouri in this case.

OPINIONS BELOW

The opinion of the supreme court of Missouri (App., *infra*, A-1) is reported at 959 S.W.2d 100. The opinion of the circuit court for Cole County (App., *infra*, A-16) is not reported.

JURISDICTION

The supreme court of Missouri entered its judgment on December 23, 1997 (p. A-1, *infra*). The supreme court denied a timely motion for rehearing on January 27, 1998 (p. A-15, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

Section 18(a) of Article X of the Missouri constitution establishes a revenue limit for the state government. That section is set forth in the opinion of the Missouri supreme court at p. A-3, *infra*. Section 18(b) provides:

> For any fiscal year in the event that total state revenues exceed the revenue limit established in this section by one percent or more, the excess revenues shall be refunded pro rata based on the liability reported on the Missouri state income tax (or its successor tax or taxes) annual returns filed following the close of such fiscal year. If the excess is less than one percent, this excess shall be transferred to the general revenue fund.

STATEMENT OF THE CASE

Petitioners, two not-for-profit corporations and two individuals, are residents of Missouri who paid state sales taxes and other

state taxes during fiscal year (FY) 1995,[1] but did not pay any Missouri income tax or report any Missouri income tax liability on returns filed during FY 1996. They sued the state and its responsible officials, alleging that the state's plan to distribute "excess revenues" collected in FY 1995 only to those who filed income tax returns in FY 1996, on the basis of the income tax liability reported, excluding from participation in the distribution those persons who pay sales taxes and other taxes and fees, violates the Equal Protection Clause of the Fourteenth Amendment. Petitioners sought declaratory and injunctive relief. The circuit court denied relief, and the supreme court of Missouri affirmed.

1. The "refund" provision of Missouri's constitution

In 1980, following the lead of California and Michigan, interested citizens in Missouri submitted to the voters a constitutional amendment, by the initiative. In November, 1980, the voters approved that amendment. It appears in the Missouri constitution as Article X, §§ 16-24. It is popularly called the "Hancock Amendment."

The Missouri supreme court has consistently stated that the central purpose of the Hancock Amendment is to "rein in increases in governmental revenues and expenditures." See page A-2, *infra*. While the amendment deals in part with revenues of cities and counties, and with the financial relationship between the state and its political subdivisions, the principal feature of the amendment is the establishment of a state revenue limit. The revenue limit is defined by a complicated formula, set forth in §18(a), quoted at page A-3, *infra*. The wording of that revenue limit has been much criticized, but is here assumed to be adequately definite and valid. The limit is imposed upon "total

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[1] Missouri's budgets and accounts are based on fiscal years, not calendar years. FY 1995 ended on June 30, 1995.

state revenues," which include revenues from many sources. The proportions contributed by each revenue source change from year to year. The parties stipulated that in FY 1995 income taxes accounted for somewhat more than half of total state revenues, although subsequent review of precise numbers indicates that income taxes contributed approximately 43% of total state revenues in that year. Sales taxes are the second largest source of total state revenues.

To implement the revenue limit, § 18(b) of the Hancock Amendment requires that the excess revenues be refunded pro rata based on the liability reported on the Missouri state income tax annual returns filed following the close of the fiscal year. However, if the excess revenues are less than 1% of total state revenue, the excess is to be transferred to the general revenue fund.

Immediately after its enactment this provision was challenged as a violation of the Equal Protection Clause of the Fourteenth Amendment, in excluding sales taxpayers and others from participation in the distribution of the excess revenues to which they all have contributed. In the early life of this amendment two judges of the Missouri supreme court expressed the opinion that the refund provision denied equal protection of the laws, but on each occasion a majority of the court declined to consider the question on the ground that it was not ripe for review because the state revenue limit had not been exceeded. *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 16-17 (Mo. banc 1981); *Buechner v. Bond*, 650 S.W.2d 611, 615-16 (Mo. banc 1983). Until the revenue limit was in fact exceeded in FY 1995, as determined by the state in 1996, there was no appropriate occasion for judicial review of the validity of the refund provision.

In the summer of 1996 the defendants announced their plans to distribute the FY 1995 excess revenue by mailing "refund" checks in the fall to income taxpayers, pursuant to the mandate

of this refund provision. In August, 1996, petitioners filed this suit seeking a declaratory judgment that the refund provision of §18(b) is unconstitutional, and an injunction against distributing the FY 1995 excess revenue in accordance with this provision.

2. Proceedings below

The petition was filed and a temporary restraining order was issued on August 23, 1996. The petition named as defendants not only the state, but also the Treasurer, whose duty it would be to sign the checks, and the three other officials who play a role in determining the amount of excess revenue to be "refunded" to each person, namely, the Governor, the Director of the Department of Revenue, and the Commissioner of Administration.

The case was tried on September 25, 1996. Most of the facts were stipulated. For FY 1995 the "total state revenue" exceeded the revenue limit by approximately $147 million. The defendants were carrying out their preparations to pay the excess revenues to Missouri income taxpayers pursuant to the mandate of Article X, §18(b). In order to accomplish this, they were dividing each income taxpayer's paid income tax liability for annual returns filed during FY 1996 into the total amount of paid income tax liability for annual returns filed during that fiscal year, thus deriving a percentage or ratio, and applying that ratio to the total amount of "excess revenue" for FY 1995, to determine the amount to be distributed to each income taxpayer.

The "total state revenue" for FY 1995 included revenue from many sources. Income taxes paid in FY 1995 (not those paid for calendar year 1995 in April 1996) accounted for somewhat more than half of that total.[2] The second largest source of revenue was sales tax. Tr. 46. Other significant sources of revenue included

[2] Subsequent calculations based on precise accounts led to the conclusion that income taxes accounted for approximately 43% of the total. See p. A-27, *infra*.

motor fuel taxes and use taxes. It was stipulated that, pursuant to the constitution's "refund" provision, persons who paid sales, use, motor fuel, cigarette or other state taxes or fees during FY 1995, but did not file Missouri income tax returns during FY 1996 showing income tax liability, would not receive any of the "excess revenue" that was to be distributed.

At trial the evidence showed that the third largest source of revenue, the insurance premium tax, is derived from individual policy holders, who are readily identifiable. Tr. 46. The next largest category of revenues is corporate franchise taxes, paid by corporations readily identifiable. Tr. 47. The next is the estate tax, and those taxpayers are readily identifiable. Tr. 47. Many of the other revenues are paid by persons who are readily identifiable. Tr. 47. The defendants presented an expert witness who prepared and explained defendant's Exhibit A, page A-29, *infra*. He conceded that sales taxes paid by individuals can be estimated with a reasonable degree of accuracy, on the basis of their gross income. Tr. 74. A person who is, by income, in the lowest one-tenth of Missouri residents would pay $489 in state and local sales tax, but would pay no state income tax. Tr. 74. Fifty-five percent of the people pay more in state and local sales taxes than they pay in state income taxes. Page A-29, *infra*. More than 20 % contribute more to total state revenue by way of state sales tax than by way of state income tax.

After the trial the parties filed briefs, and proposed findings and conclusions. On January 6, 1997, the circuit court entered its judgment, holding that there was no denial of Equal Protection. Subsequently the circuit court stayed the mailing of checks pending the appeal.

On appeal, the Equal Protection argument was pursued by petitioners. On December 23, 1997, the Missouri supreme court affirmed, holding that there was no denial of Equal Protection. The court first reviewed Equal Protection jurisprudence in

general, and acknowledged that the issue is whether the classification established by the state law in question is rationally related to a legitimate state interest. The court then undertook to apply the law to the facts of this case. The court abandoned any consideration of the classification established by §18(b), favoring income taxpayers and disfavoring all others. The court held that the overall effect of §18(b) is rationally related to the purpose "to rein in increases in governmental revenue and expenditures." Page A-8, *infra*.

Petitioners filed a timely petition for rehearing on January 6, 1998. Rehearing was denied on January 27, 1998 (page A-15, *infra*). Petitioners learned of that denial on Thursday, January 29. On that same day they dispatched to the supreme court by overnight mail a motion to stay the mailing of checks pending certiorari proceedings. On Friday, January 30, the supreme court Clerk notified counsel by telephone that the mandate had issued on January 29, and there was no case pending before the court in which to file a motion for stay. The Clerk returned all copies of the motion by mail on February 2 (p. A-26, *infra*).

On Friday, January 30, petitioners transmitted to the circuit court a motion for stay pending certiorari proceedings (p. A-27, *infra*). Petitioners were not able to obtain a hearing on that motion for stay until February 9, 1998, at which time the circuit judge denied the motion, stating, "I have no jurisdiction."

3. The Equal Protection claim was timely raised and preserved

In paragraph 16A of the original petition filed in the circuit court petitioners claimed that "§18(b) . . . discriminates against the poor . . . in violation of the equal protection clauses of the Fourteenth Amendment of the United States Constitution . . ." The prayer sought a declaratory judgment that the "refund mandate of Article X, §18(b) of the Missouri Constitution is

unconstitutional, in violation of the Fourteenth Amendment," and sought an injunction against "implementing the mandate of Article X, §18(b)." The first amended petition, on which the case was tried, set forth the same allegation and prayer.

Petitioners' trial brief argued that §18(b) violates "the equal protection clause," citing *Zobel v. Williams*, 457 U.S. 55, 60 (1982); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985); and other Equal Protection cases. The proposed Conclusions of Law submitted by petitioners to the circuit court included the conclusion that §18(b) "deprives the plaintiffs of . . . the equal protection of the laws, in violation of the Fourteenth Amendment," citing *Zobel v. Williams*, *supra* and other Equal Protection cases. The judgment proposed by plaintiffs in the circuit court included a "declaratory judgment that: A. The refund mandate of Article X, §18(b) . . . is unconstitutional in violation of the Fourteenth Amendment." Plaintiffs' reply brief filed in the circuit court argued extensively that §18(b) "is an unconstitutional violation of the Equal Protection Clause," citing *Zobel v. Williams*, *supra*, and other Equal Protection cases.

The circuit court opinion acknowledged that "Plaintiffs contend that the refund mechanism violates the Equal Protection Clause of the U.S. Constitution . . .," and rejected petitioners' "equal protection challenge of the Hancock Amendment's enforcement mechanism, the refund provision of Section 18(b)..." Pages A-20, A-21, *infra*.

On appeal, the Equal Protection claim was the first Point Relied On set forth in petitioners' brief:

> The circuit court erred in entering judgment for the defendants, refusing to issue the declaratory and injunctive relief requested, because the refund mechanism provided in Article X, Section 18(b): A. Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States constitution . . . ,

citing *Zobel, Hooper,* and other Equal Protection cases. The first point of the argument quoted the Equal Protection standard from *Zobel*: "A law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose." *Zobel v. Williams*, 457 U.S. at 60. The same point was argued extensively in the reply brief, where petitioners pointed out that the attorney general, in his brief, did "not even contend that the distinction made by §18(b) between income taxpayers and the other taxpayers who contributed to the 'excess revenue' furthers any state purpose whatever."

In its opinion the supreme court acknowledged that petitioners "insist that this refund provision violates constitutional guarantees of equal protection . . ." Page A-2, *infra*. The court rejected that contention.

In their motion for rehearing before the supreme court petitioners again argued:

> The test to determine whether the refund mechanism of Article X, §18(b) violates the Equal Protection Clause is whether "the distinction it makes rationally furthers a legitimate state purpose." *Zobel v. Williams*, 457 U.S. 55, 60 (1982). This Court misinterpreted the law when it stated that the test is whether "the means chosen to implement the law is rationally related to achieving" the purpose (slip op. p. 7) or whether the refund mechanism "is a rational means of achieving that purpose" (p. 9).

REASONS FOR GRANTING THE PETITION

In refusing to apply the established standard of review to determine whether a legislative distinction denies equal protection of the laws, the decision below conflicts with all modern equal protection jurisprudence, including such cases as *Zobel v. Williams*, 457 U.S. 55 (1982). The decision not only deprives

Missouri's less fortunate citizens of their fair share of the state's "excess revenues," but also deprives all Missourians of a judicial system which endeavors to uphold and enforce the Fourteenth Amendment. The substantive decision is of increasingly widespread importance, because other states are struggling to decide how to dispose of "excess revenues," and these excesses are anticipated to continue in future years.

1. In ruling on this challenge to Missouri's "refund" provision, the Missouri supreme court refused to apply the established test for violation of the Equal Protection Clause

When state law is challenged under the Due Process or Equal Protection Clauses, the same standards of review are applied to a state constitutional provision as to a state statute. *E.g.*, *Quinn v. Millsap*, 491 U.S. 95 (1989). The applicable standards are well established. The state law survives a Due Process challenge if the law bears "a reasonable relation to a proper legislative purpose," and is not arbitrary or discriminatory. *Nebbia v. New York*, 291 U.S. 502, 537 (1934). See *Kelley v. Johnson*, 425 U.S. 238, 247-48 (1976). However, when a state law is challenged under the Equal Protection Clause, the focus is not on the overall effect of the state law, but on the classification established in the state law. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). The state law will survive Equal Protection scrutiny "if the distinction it makes rationally furthers a legitimate state purpose." *Zobel, supra*, 457 U.S. at 60. This standard is applied specifically when

a state distributes benefits unequally.[3] *Zobel, supra*; *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985).

The "refund" provision of Missouri's Hancock Amendment easily survives a Due Process challenge. The purpose of the Hancock Amendment, as stated by Missouri's supreme court (p. A-7-8), is "to rein in increases in governmental revenue and expenditures." This is unquestionably a legitimate state purpose. Any requirement that the state government disgorge its "excess revenue" would clearly be related to that purpose. That purpose is served by a requirement that the state pay out the money to income taxpayers, or to anyone else. To borrow an example from this Court's recent effort to explain the Equal Protection Clause to the Missouri supreme court, that purpose would be served by requiring that the money be paid out to white males, an obviously untenable requirement under the Equal Protection Clause. *Quinn v. Millsap, supra*, 491 U.S. at 106.

It is equally clear that the "refund" provision cannot survive an Equal Protection challenge. The state must disgorge the "excess revenue." Limiting the recipients of the state's bounty to income taxpayers does not further the stated purpose. As noted above, the purpose would be equally well served by distributing the money to white males, or to any non-governmental recipients.

Confronted with this dilemma, the Missouri supreme court upheld the "refund" provision by applying the Due Process

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[3] This Missouri case concerns distribution of excess money derived from many different sources. It does not concern any scheme of taxation. However, during the course of the litigation it has at times been suggested that the Missouri constitutional "refund" provision should be regarded as a tax mechanism. That suggestion would simply lead to the identical standard of review. The universal Equal Protection standard is applied to tax cases. *E.g.*, *Williams v. Vermont*, 472 U.S. 14, 22-23 (1985); *Nordlinger v. Hahn*, 505 U.S. 1, 10, 11 (1992).

standard. In an introductory review of Equal Protection jurisprudence, the court appeared to acknowledge that Equal Protection review focuses on whether the legislative **classification** is rationally related to a legitimate state purpose, not whether the overall effect of the law is rationally related to a legitimate state purpose. Page A-6, *infra*. However, in considering the validity of the "refund" provision, the court ignored the classification established by the "refund" provision, contenting itself with the conclusion that the "refund mechanism employed by §18(b) is rationally related to the Hancock Amendment's purpose." Page A-8, *infra*. The court did not decide, or even suggest, that the purpose to rein in governmental expenditures would be somehow advanced by limiting the recipients of the excess revenues to income taxpayers.

The court went on to offer four reasons to support its conclusion that "the means chosen to implement the law is rationally related to achieving that purpose." Page A-8, *infra*. None of those four reasons supplies the missing Equal Protection analysis, or recants the erroneous statement of the applicable standard.

The first reason demonstrates again that the court is applying the Due Process standard, not the Equal Protection standard. The court simply asserted that "the refund commanded by §18(b) is a penalty imposed on the government for collecting too much revenue," and making the government give up the excess revenue clearly serves the purpose to rein in governmental expenditures. Page A-8, *infra*. As noted above, this application of the Due Process standard to an Equal Protection challenge would render the Equal Protection Clause inapplicable even to a requirement that the excess revenue be paid out to white males. This result, and the reasoning that leads to it, are obviously untenable. *Quinn v. Millsap*, *supra*, 491 U.S. at 106.

The supreme court of Missouri did not advance the analysis by referring to the "refund" provision as a provision to "make the

government give back money to the persons from whom it took the excess revenue" (page A-8, *infra*). Income taxpayers contributed only 43% of the "excess revenue."[4] See page A-27, *infra*. If the excess revenue is to be "given back" to persons from whom it was taken, it would be given back to those who substantially contributed to the excess revenue, including sales taxpayers, as well as income taxpayers.

The second of the "reasons" offered by the court below also appears to be an application of the Due Process standard rather than the Equal Protection standard. The court asserted that paying the excess revenue to income taxpayers alone is rational because an income taxpayer's actual contribution to the excess revenue is readily and accurately ascertainable. Page A-8, *infra*. That is substantially correct, although the payment to the income taxpayer is not proportional to his contribution.[5] The payment appears to satisfy the Due Process standard of review. However, income taxpayers are no different in this respect from many other persons, and the court does not claim that they are. At the trial petitioners brought out that others who contribute to the excess revenues are at least as easily identifiable, accurately, as the income taxpayers, including those who pay insurance premi-

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[4] At trial, on the basis of estimates furnished by the state, the parties stipulated that income taxes paid in FY 1995 accounted for somewhat more than half of the "total state revenue" for that year. Subsequent calculations based upon more accurate information disclosed that income taxes in fact accounted for 43% of the revenue. The difference does not affect the analysis of the applicable law.

[5] Like Rev. Bembower, who testified at the trial, the recipient of the "refund" may have moved to Missouri between July 1 and December 31, 1995, and paid nothing into the total state revenues of FY 1995, but in FY 1996 paid state income tax on money earned in calendar years 1995 and 1996, thereby becoming eligible for the FY 1995 refund. Further, those who paid income taxes to Missouri in FY 1995 contributed only 43% of the total state revenues, and are rewarded greatly in excess of their contribution when they receive almost 100% of the excess revenue.

ums, those who pay corporate franchise taxes, those who pay state estate taxes, and those who pay various professional fees and license fees. Transcript pp. 46-47. And the Missouri supreme court itself conceded that sales tax payments can be estimated with reasonable accuracy. Page A-8, *infra*. The undisputed facts demonstrate that excluding these other contributors to the excess revenue impedes, rather than furthers, any supposed effort to distribute the excess revenues on the basis of the taxpayer's actual contribution. The opinion below made no effort to apply the Equal Protection standard and demonstrate that excluding these other contributors from participation in the distribution of the excess revenues furthers either the goal to deprive the state of the money or any assumed goal to refund to each person his "actual contribution" to the excess revenue.

The third "reason" offered by the court below does not support the court's conclusion. The court below asserted that distribution of the excess revenue on the basis of income tax liability more accurately reflects each person's "actual contribution" to the excess revenue than would a per capita distribution to all state residents, or a distribution based solely on sales tax estimates. Page A-9,*infra*. This "reason" is irrelevant to the stated goal to rein in governmental expenditures. If it is viewed as establishing a new, secondary goal, to distribute the excess revenue on the basis of each person's contribution to the excess, the analysis is again irrelevant. In this record there has been no suggestion that a refund be based solely on sales tax estimates.[6] An obvious alternative, which the court below declined to recognize, is to distribute the excess revenue on the basis of each person's contribution, including not only those who pay income taxes but also those persons who pay sales taxes and other substantial taxes (putting aside de minimis contributions). Limiting the

[6] The suggestion would have substantial merit. A refund based on sales tax estimates would reflect the contribution of the greatest number of taxpayers. See pages 19-20, A-29, *infra*.

beneficiaries of the state's distribution to income taxpayers alone establishes a distribution which is far less precise, on its face, than a more inclusive distribution, and undermines, rather than furthers, this assumed purpose to "refund" on the basis of each person's "actual contribution."

The fourth "reason" set forth in the opinion below adds further obfuscation. It is surely correct that a distribution on the basis of income tax liability facilitates participation by non-residents who earned income in Missouri and paid income tax to Missouri. Page A-9, *infra*. That point is not relevant to the stated purpose to rein in governmental revenue and expenditures. Even if it be assumed that the state purpose is to benefit the non-resident income taxpayer (a highly unrealistic assumption), that purpose is not rationally served by excluding the sales taxpayers and other contributors from their fair share of the excess revenue. Indeed, the payment to the non-resident income taxpayer would more accurately reflect his "actual contribution" to the excess revenue if sales taxpayers and other contributors were allowed to participate in the distribution.

In summary, the holding of the court below is that distribution of the excess revenue on the basis of income tax liability alone is rationally related to achieving the purpose to rein in increases in governmental revenue and expenditures. Of course it is. The same would be true of a distribution to anybody, including white males. The court below was plainly applying the wrong standard to an Equal Protection challenge. The statement of four "reasons" to support that holding in part confirms the fact that the court was applying the wrong standard, and in part merely adds confusion. The essence of the opinion is that the Missouri supreme court was applying the standard for a Due Process challenge, not an Equal Protection challenge.

2. The classification established in Missouri's "refund" provision does not further any identified state purpose

According to the Missouri supreme court (page A-7-8, *infra*), the state purpose which is controlling here is the purpose "to rein in increases in governmental revenue and expenditures." The state's interest in achieving that goal "is not in any way served by" distributing the excess revenues to income taxpayers only, on the basis of income tax liability, excluding from participation those who pay sales taxes and other taxes, but not income taxes. *Zobel v. Williams*, *supra*, 457 U.S. at 62. Neither the Missouri attorney general nor the Missouri supreme court has made any effort, at any time, to present an argument that the goal is served by this exclusion.

No other "legitimate state purpose" has been identified by the court below. If one attempts to extract some subsidiary purpose from the opinion below, any such purpose is also not served by limiting the recipients to income taxpayers, as is shown above.

3. The decision below deprives thousands of Missourians of their fair share of the state's "excess revenue," and of judicial enforcement of the Fourteenth Amendment

There is no dispute that many Missouri residents pay no state income tax, but pay substantial state sales taxes and other state taxes. The expert witness presented by respondents estimated that 10% of Missourians pay no state income tax, but pay from 7.5% to 10.6% of their gross income in state and local sales taxes. Defendants Ex. A, p. A-29, *infra*. Further, those who are slightly more fortunate, and earn just enough to pay a small state income tax, pay many times the amount of that state income tax in state sales taxes. At least 55% of Missourians pay more in state and local sales taxes than in state income taxes. At least 20% pay more into total state revenues in state sales taxes than in state income taxes.

In short, many Missourians are paying substantial amounts into Missouri's "total state revenues," but are completely shut out when the "excess revenues" are distributed. For the fiscal year ending June 30, 1995, the revenue from the state sales and use taxes in Missouri exceeded that from the corporate income taxes by a factor of approximately four. Plaintiffs' Ex. 5, p. 20. However, the corporate income taxpayers are receiving a major share of the "excess revenues," and the sales and use taxpayers are receiving nothing. The revenue collected from sales and use taxes for that year was approximately 60% as great as that from individual income taxes, but the distribution is based upon income tax liability alone. It is beyond question that many Missouri taxpayers are being deprived of their fair share of the state's "excess revenues," by reason of the classification established in the "refund" provision of the Hancock Amendment.

The courts below accept this discrimination. Apparently the poor are considered to be unworthy, benefiting from the welfare payments taken from the rich. The observations of the circuit court are revealing:

> [T]hose in higher income brackets pay a greater amount of sales taxes than those in the lowest brackets -- in addition to paying the income taxes that these plaintiffs have been able to avoid. Furthermore, those Missourians in the lowest income brackets who incur no net income tax liability receive transfer payments and other subsidies such as food stamps and the earned income tax credit which allow them to consume far in excess of their stated gross income. . . .
>
> . . . [E]ven if plaintiffs' characterization were correct, that the refunds are a transfer of benefits from non-income taxpayers to income taxpayers, plaintiffs would be no more entitled to due process than would income taxpayers whose taxes are used to subsidize the poor with food stamps and other transfer payments. The Court notes that those Mis-

> sourians with the lowest levels of gross income have levels of consumption in excess of that income thanks to these very types of transfer payments.

Pages A-18, A-23, *infra*. Nothing in the record shows that any of the plaintiffs, either the two not-for-profit corporations or the two individuals, receive any transfer payments. Nevertheless, the same tone runs through the brief filed by the attorney general in the circuit court:

> Certainly the Missouri income tax system, like the federal system, creates not just one but many "classes" based on income, including the privileged, untaxed class to which the plaintiffs belong . . . [T]hose in the lowest income brackets are actually spending more than their gross income -- income that excludes the earned income tax credit, food stamps, and other transfer payments. The criteria for making those transfer payments are based on wealth and income. The wealthy and the middle class do not qualify. Those whose incomes are so low that they do not have to pay income tax (and thus do not qualify for the Hancock refund) are the principal beneficiaries of these programs. . . . The plaintiffs never explain how the court could accept their rejection of the use of income taxes as the basis for a refund without reaching a holding that would deprive them of their privileged status in terms of tax avoidance and transfer payment eligibility. While recipients of transfer payments do pay sales taxes, unlike income taxpayers they do not pay sales taxes with funds that have already been taxed once. Rather, they make many of their purchases with funds extracted from income tax payers, and which are not subject to the income tax . . .

As this Court has previously pointed out, a societal "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *U.S. Department of Agriculture v.*

Moreno, 413 U.S. 528, 534 (1973). The *Moreno* ruling can be usefully paraphrased here:

> Thus, in practical operation, the [refund provision] excludes from participation in the [distribution] program, not those persons who [have not contributed to the excess revenue] but, rather, *only* those persons who are so [poor that they do not even pay income tax]. Traditional Equal Protection analysis does not require that every classification be drawn with precise "mathematical nicety." *Dandridge v. Williams*, 397 U.S., at 485. But the classification here in issue is not only "imprecise," it is wholly without any rational basis.

413 U.S. at 538. The decision below withdraws from the undeserving poor, those who benefit from their "privileged status in terms of tax avoidance and transfer payment eligibility," the specific legal protection of the Equal Protection Clause. *Cf. Romer v. Evans*, 517 U.S. 620, 633, 634 (1996).

4. The disposition of excess revenues is an ongoing problem in Missouri, and also in other states

Because the Missouri courts refused to stay the distribution of the excess revenues of fiscal years 1995 and 1996 pending certiorari proceedings, those distributions have been made. However, the case presented here is not moot, even in Missouri. Because of the current economic prosperity, the revenue limit was exceeded in FY 1997 by more than twice the 1995 amount of excess, and the state is planning to pursue the same distribution program respecting the excess revenue for that year, mailing the "refund" payments in the fall of 1998. Further, state officials anticipate that the revenue limit will be exceeded again in FY 1998, requiring another distribution of excess revenues in the fall of 1999, and for the next four or five years. The declaratory relief sought by these petitioners still presents a live controversy.

Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 121-22 (1974). The "refund" program challenged here is not only "capable of repetition," but is inevitably being repeated. *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976); *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

The importance of the question presented here is not limited to Missouri. Revenue and/or spending limitations prevail in at least one-fifth of the states. In a majority of those a refund or tax credit is mandatory. In the remainder it is optional. These constraints are embodied in state constitutions, or statutes, or both. Rafool, *State Tax and Expenditure Limits*, Legislative Finance Paper No. 104, National Conference of State Legislatures, Nov. 1996. In at least one state where a tax credit or refund is not required, the legislature has been struggling with proposals to restore excess revenues to taxpayers. It is important that all these states give due respect to the Equal Protection Clause.

Colorado recently adopted a program by statute to restore excess revenues to the people. The Colorado constitution, unlike the Missouri constitution, authorizes the use of any reasonable method for refunding excess revenues. In a special session in the fall of 1997 the Colorado General Assembly adopted a statute providing for refund of the excess revenues for the 1996-97 fiscal year. Section 39-22-120, Colo. Rev. Stat. In calling the special session, the Governor stated: "Since many people have paid something, it is unfair to limit the refund to people who have an income tax liability." Being free to choose a reasonable method, the Colorado General Assembly determined that, because the excess revenues are derived from a wide variety of state taxes and fees, they should "be returned to as large a group of Colorado residents as is identifiable and economically feasible." § 39-22-120.1(i)(I). It was determined that this group is those residents who pay state sales taxes, because "more Coloradans

pay state sales tax than any other state tax." § 39-22-120.1(i)(III). Without attempting to match the refund with any contribution, dollar for dollar, the Colorado General Assembly established refund amounts of $37, $60 and $80 for a single person, doubling each amount for a couple. These amounts were correlated with individuals' federal adjusted gross income for the 1997 tax year. One whose adjusted gross income is less than or equal to $15,000 (and may have neither owed nor paid income tax) receives a tax credit (or refund) of $37, which he can obtain by filing an income tax return demonstrating his qualifications. One whose adjusted gross income is greater than $15,000 but not more than $100,000 receives a credit against income tax of $60. All others receive a credit of $80. In Colorado virtually all who contribute to the excess revenue are permitted to participate in the distribution. The Colorado statute illustrates the point that the distribution easily can -- and should -- be far more equitable and inclusive than Missouri's refund provision permits.

Petitioners are informed that during the 1998 legislative session Connecticut is deliberating proposals to return excess revenues to the people (see *Christian Science Monitor*, March 2, 1998, p. 1), and Colorado is again considering various alternatives for restoring that state's excess revenue to the taxpayers over the next several years.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF MISSOURI
en banc

No. 79708

MISSOURIANS FOR TAX JUSTICE
EDUCATION PROJECT, ET AL.,
Appellants,

v.

BOB HOLDEN, ET AL.,
Respondents.

Appeal from the Circuit Court of Cole County
Honorable Byron L. Kinder, Judge

DUPLICATE OF FILING ON: DEC. 23, 1997
IN OFFICE OF CLERK SUPREME COURT

Missourians for Tax Justice Education Project, Inc., and the Missouri Association for Social Welfare are not-for-profit Missouri corporations. Each of these appellants paid sales tax during the state's fiscal years 1995 and 1996, but paid no income tax. Larry C. Gaines and LaVonne Shinn, also appellants, are individual Missouri residents who paid sales tax but no income tax during the same fiscal years.

Article X. section 18(b) of the Missouri Constitution requires the government to refund state revenues on a pro rata basis to

Missouri state income taxpayers when "total state revenues" exceed the revenue limit established in article X, section 18(a) by more than one percent. Appellants insist that this refund provision violates constitutional guarantees of equal protection and due process because it discriminates against persons who paid no income taxes and these persons are generally poor. Appellants also claim that the entirety of the voter-approved tax and spending limitation contained in the constitution is too vague to accommodate rational application and, therefore, is void.

The trial court found the challenged provisions constitutional but issued a stay precluding the government from proceeding with its plans for distributing a refund pending this appeal. Because the validity of a provision of the state constitution is in question, we have jurisdiction. Mo. Const. art. V, sec. 3. The judgment of the trial court is affirmed. The stay previously entered by the trial court is dissolved.

I.

At the general election in 1980, Missouri voters approved an amendment to the constitution popularly dubbed "the Hancock Amendment." Mo. Const. art. X, sec. 16-24. The purpose of the Hancock Amendment is "to rein in increases in governmental revenue and expenditures." *Roberts v. McNary,* 636 S.W.2d 332, 336 (Mo. banc 1982). *See Beatty v. Metropolitan St. Louis Sewer District,* 867 S.W.2d 217, 221 (Mo. banc 1993) ("Reduced to its essence, the Hancock Amendment reveals the voters' basic distrust of the ability of representative government to keep its taxing and spending requirements in check.")

To achieve its purpose of reining in increases in governmental revenue and expenditures, the constitution establishes an annual revenue limit for state government and requires the state to disgorge the excess when its annual revenues exceed the constitutional revenue ceiling.

(a) There is hereby established a limit on the total amount of taxes which may be imposed by the general assembly in any fiscal year on the taxpayers of this state. Effective with fiscal year 1981-1982, and for each fiscal year thereafter, the general assembly shall not impose taxes of any kind which, together with all other revenues of the state, federal funds excluded, exceed the revenue limit established in this section. The revenue limit shall be calculated for each fiscal year and shall be equal to the product of the ratio of total state revenues in fiscal year 1980-1981 divided by the personal income of Missouri in calendar year 1979 multiplied by the personal income of Missouri in either the calendar year prior to the calendar year in which appropriations for the fiscal year for which the calculation is being made, or the average of personal income of Missouri in the previous three calendar years, whichever is greater.

(b) For any fiscal year in the event that total state revenues exceed the revenue limit established in this section by one percent or more, the excess revenues shall be refunded pro rata based on the liability reported on the Missouri state income tax (or its successor tax or taxes) annual returns filed following the close of such fiscal year. If the excess is less than one percent, this excess shall be transferred to the general revenue fund.

Mo. Const. art. X, sec. 18 (a) and (b).

Appellants claim that a pro-rata refund to income taxpayers violates equal protection, U.S. Const. amend XIV, and due process.[1] In support of their equal protection argument, appel-

[1]Appellants' due process argument is apparently not serious. Their brief makes its due process argument in less than a full page and cites no case authority. Appellants insist that a refund of state moneys collected by all of

Cont'd on page 4.

lants offer two arguments: First, they claim that the purpose of the Hancock Amendment is not a legitimate state purpose. Second, appellants urge this Court to declare poverty a suspect classification to which strict scrutiny equal protection analysis applies.

A.

When considering claims that a law violates the Equal Protection Clause, the first step is to determine whether the statutory scheme "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution . . . ." *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 17 (1973); *State Board of Registration v. Griffen,* 651 S.W.2d 475, 479 (Mo. banc 1983). If so, the statutory scheme receives strict judicial scrutiny to determine whether the classification is necessary to accomplish a compelling state interest. *Id.* If the classification neither burdens a suspect class, nor impinges upon a fundamental right, the

Footnote 1 *cont'd from page 3.*

the state's taxes to income taxpayers only is a taking from the poor for the private advantage of the not-poor, without due process of law. Appellants are convinced that this scheme violates the Fifth and Fourteenth Amendments to the federal constitution and article I, sections 10 and 28 of the state constitution.

If there is a taking in this case, it occurs when the tax is demanded and collected. The refund is not a taking for the private purposes of the not-poor because the funds from which the refund is made were not collected for that purpose. The taxes collected are collected for the purpose of funding governmental operations and programs, many of which directly benefit the poor whom these appellants claim to champion. Until a fiscal year closes, the government does not know whether it owes a refund or not.

We are not prepared to hold—as appellant's argument seems to assert when properly understood—that the government's ***collection*** of taxes constitutes a taking in violation of due process. The Sixteenth Amendment to the federal constitution and article X, sections 1 and 2 of the state constitution resolve that argument in the government's favor.

only issue is whether the classification is rationally related to a legitimate state interest. *Friedman v. Rogers,* 440 U.S. 1, 17 (1979); *Griffen, supra,* 651 S.W.2d at 479. The burden is on the person attacking the classification to show that it does not rest upon any reasonable basis and is purely arbitrary. *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78-79 (1911); *City of St. Louis v. Liberman,* 547 S.W.2d 452, 458 (Mo. banc 1977). Under this analysis a classification is constitutional if any state of facts can be reasonably conceived that would justify it. *McGowan v. Maryland,* 366 U.S. 420, 426 (1961); *Liberman, supra,* 547 S.W.2d at 458.

A suspect classification exists where a group of persons is legally categorized and the resulting class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Rodriguez,* 411 U.S. at 28. Classifications based on wealth/poverty do not fit this description.

> That wealth classifications *alone* have not necessarily been considered to bear the same high degree of suspectness [sic] as have classifications based on, for instance, race or alienage may be explainable on a number of grounds. The "poor" may not be seen as politically powerless as certain discrete and insular minority groups. . . . [P]ersonal poverty is not a permanent disability; its shackles may be escaped. Perhaps most importantly, though, personal wealth may not necessarily share the general irrelevance as a basis for legislative action that race or nationality is recognized to have.

(Emphasis added). *Id.* at 121. (Marshall, J., dissenting). Thus, the United States Supreme Court "has never. . . held that wealth discrimination *alone* provides an adequate basis for invoking strict scrutiny. . . ."(Emphasis added). *Id.* at 29.

The use of the word "alone" in the *Rodriguez* majority opinion and dissent is significant. Where the Supreme Court has applied strict scrutiny to a wealth-based classification, it has found that the wealth-based classification also implicated a fundamental right.[2] As appellants lay no claim to a loss of any fundamental right in connection with the refund plan contained in section 18(b), they ask this Court to declare poverty a suspect classification on that basis alone. We decline their invitation and hold that the classification between income taxpayers and other taxpayers established in section 18(b) does not create a suspect classification.

B.

A legal classification considered under a rational basis standard will survive judicial examination if the state's purpose in creating the classification is legitimate, *Zobel v. Williams*, 457 U.S. 55, 60 (1982), and "if any state of facts reasonably may be conceived to justify" the classification chosen to accomplish that purpose. *McGowan v. Maryland,* 366 U.S. at 426.

Appellants rely on *Zobel* and *Quinn v. Milisap,* 491 U.S. 95 (1989), apparently convinced that these cases reject wealth-based classification under a rational basis test and, therefore, control this case. We disagree.

In *Zobel,* Alaska decided to distribute a financial windfall to the state resulting from the discovery of oil at Prudhoe Bay to the state's adult residents. The plan, initiated in 1979, permitted each adult resident to receive a specified dollar amount for every year

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[2]For example, one group of cases deals with the right to vote or be a candidate for office. *Bullock v. Carter,* 405 U.S. 134 (1972) (candidates' filing fees). E.g., *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966) (poll tax). A second group addresses wealth classifications that impinge on access to the judicial system. E.g., *Douglas v. California,* 372 U.S. 353 (1963) (ability to pursue an appeal); *Griffin v. Illinois,* 351 U.S. 12 (1956) (payment of transcript on appeal fees).

of residency since statehood in 1959. Short-term Alaska residents challenged the plan, claiming that the enhanced dividend payment to long-term Alaskans violated the Equal Protection Clause. Alaska argued that the dividend created a financial incentive for persons to establish and maintain residence in Alaska, encouraged prudent management of the fund created from the oil revenues and recognized residents' undefined contributions to the state during their years of residency since statehood. The plurality opinion found the first two objectives "not rationally related to the distinctions Alaska seeks to make between newer residents and those who have been in the State since 1959." *Id.* at 61. The third rationale "is not a legitimate state purpose" *id.* at 63, because the Equal Protection Clause does not recognize an apportionment of state services based on length of residency in the state. *Shapiro v. Thompson*, 394 U.S. 618, 632-3 (1969). For these reasons, the *Zobel* court struck down the Alaska dividend plan as a violation of equal protection.

In *Quinn*, the Supreme Court struck down a provision of the Missouri constitution, art. VI, sec. 30(a), requiring that persons appointed to a commission to consider reorganization of city and county government in the St. Louis area own real property. Relying on *Turner v. Fouche*, 396 U.S. 346 (1970), the Supreme Court held that the landowner requirement was not rationally related to any legitimate state interest.

Appellants claim that the Hancock Amendment contains an illegitimate purpose. They insist that the purpose of the Hancock Amendment is to provide a refund to income taxpayers. Under *Zobel*, if the government's purpose is not legitimate, the means chosen to implement that purpose, however rational, cannot save the law from condemnation by the Equal Protection Clause.

Appellant's argument, while serving appellants' own purposes, confuses means with end and ignores this Court's long-standing, consistent reading of the Hancock Amendment's

purpose: "to rein in increases in governmental revenue and expenditures." *Roberts,* 636 S.W.2d at 336. Constitutional demands that the government operate in a fiscally-prudent manner and live within its fiscal means are legitimate state purposes.

If the purposes of the law are legitimate, all that remains is to determine whether the means chosen to implement the law is rationally related to achieving that purpose. The refund mechanism employed by section 18(b) is rationally related to the Hancock Amendment's purpose for at least four reasons.

First, the refund commanded by section 18(b) is a penalty imposed on the government for collecting too much revenue. To make the government give back money to the persons from whom it took the excess revenue rationally serves the purposes of the Hancock Amendment previously expressed.

Second, the specific refund method chosen in section 18(b) to carry out the amendment's purpose is also rational. The amendment's revenue calculations are year-specific. An income taxpayer's actual contribution to the government's excess revenue in the fiscal year in question is readily and accurately ascertainable. It is true, as appellants claim, that the state can estimate a person's sales tax payments for a given fiscal period. But it is also true that the existence of another, even more mathematically precise method of achieving the constitution's purposes does not render the chosen method irrational for equal protection purposes. "[R]ational distinctions may be made with substantially less than mathematical exactitude." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Third, any other form of refund suggested by appellants would not refund excess state revenue on the basis of a person's contribution to the excess. It is true that a per capita refund to all state residents would provide refunds to persons who paid no income tax but such a refund would make no effort to determine

any person's share of the contribution to the state's excess revenue. If a refund based on an estimate of an individual's sales tax liability forms the basis for a refund -- as appellants' counsel suggested it might during oral argument -- the estimate can be determined only by reference to individual income. A refund mechanism that focuses on income taxpayers accounts indirectly for sales tax payments made by most income taxpayers and more accurately reflects a person's actual contribution to the state's excess revenue than either a per capita or a sales tax refund would. For this reason, an income tax refund is more mathematically precise in directing refunds to persons based on actual contributions to the state's excess revenue than either a per capita tax refund or a refund based solely on sales tax estimates.

Fourth, a refund system that focuses on income tax allows persons who earned income in Missouri and paid income tax to this state but who live in other states to participate. This state's sales tax scheme permits no identification of persons who pay sales tax. An income tax refund plan defeats any argument, however specious, that the Hancock Amendment discriminates against non-Missouri residents in violation of the negative command[3] of the Commerce Clause, U.S. Const. art. I, sec. 8, cl. 3, the Privileges and Immunities Clauses, U.S. Const. art. IV, sec. 2, cl. 1, and amend. XIV, sec. 1, or the right to travel announced in *Shapiro*.

These reasons are sufficient to permit us to conclude that the Hancock Amendment furthers a legitimate state purpose and that the refund mechanism employed in section 18(b) is a rational means of achieving that purpose.

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[3]The Commerce Clause "embodies a negative command forbidding the States to discriminate against interstate trade." *Associated Industries of Missouri v. Lohman*, _ U.S._, _, 114 S.Ct. 1815, 1820 (1994).

II.

Appellants' second point asserts that the revenue limit contained in section 18(a) is too vague to permit enforcement. "Any effort to assign various revenues of the state to 'total state revenues' or to exclude them is an arbitrary exercise. By the same token, there is no rational basis for determining what should go into . . . the 'personal income of Missouri.'" App. Br. at 24. Though the words do not appear in the second point in their brief, we assume that casserole of conclusions and catchphrases appellants employ assert a due process violation.

Appellant's argument confuses ambiguity with vagueness. Vagueness that violates due process exists where a law speaks with such uncertainty that it permits arbitrary and discriminatory enforcement, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), or in such a way that a person of ordinary intelligence does not receive fair notice from the language employed in the law what conduct that law requires or forbids. *United States v. Harriss*, 347 U.S. 612, 617 (1954).

Courts have long accepted responsibility for providing meaning to laws that are ambiguous. Well-accepted canons of construction inform this process, as does the Court's duty to uphold ambiguous laws where it is possible to interpret those laws in a manner that conforms to the demands of the constitution. *See Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 12 (Mo. banc 1981) ("This Court's duty is not to seek to condemn the [Hancock] amendment, but to seek to uphold it if possible.").

Ambiguity in a law does not violate due process. "[T]he constitutional due process demand is met if the words used bear a meaning commonly understood by persons of ordinary intelligence." *State v. Allen*, 905 S.W.2d 874, 877 (Mo. banc 1995).

A.

"Total state revenues"

> includes all general and special revenues, license and fees, excluding federal funds, as defined in the budget message of the governor for fiscal year 1980-1981. Total state revenues shall exclude the amount of any credits based on actual tax liabilities or the imputed tax components of rental payments, but shall include the amount of any credits not related to actual tax liabilities.

Mo. Const. art. X. sec. 17(1). In part pertinent to our discussion, section 18(a) provides:

> The revenue limit shall be calculated for each fiscal year and shall be equal to the product of the ratio of total state revenues in fiscal year 1980-1981 divided by the personal income of Missouri in calendar year 1979 multiplied by the personal income of Missouri in either the calendar year prior to the calendar year in which appropriations for the fiscal year for which the calculation is being made, or the average of personal income of Missouri in the previous three calendar years, whichever is greater.

In *Buechner v. Bond,* 650 S.W.2d 611 (Mo. banc 1983), this Court faced two questions: Whether "unspent revenue from prior fiscal years 1979-80, the 1980-81 opening balance, is a component portion of general revenue to be included in total state revenue" and whether "'total state revenues' as used in sections 18(a) and 17(1) of article X is not capable of definition and therefore void." *Id.* at 612. We quote the Court's decision at length because it clearly describes the Court's duty and directly addresses appellants' second point.

> The rules applicable to construction of statutes are applicable to the construction of constitutional provisions; the

> latter are given broader construction due to their more permanent character. *Boone County Court v. State,* 631 S.W.2d 321, 325 (Mo. banc 1982). Words used in constitutional provisions must be viewed in context; their use is presumed intended, and not meaningless surplusage. *Roberts v. McNary,* 636 S.W.2d 332, 335 (Mo. banc 1982). The words used in constitutional provisions are interpreted so as to give effect to their plain, ordinary and natural meaning. *Boone County,* 631 S.W.2d at 324; *State ex inf. Danforth v. Cason,* 507 S.W.2d 405, 408 (Mo. banc 1973). The plain, ordinary, and natural meaning of words is that meaning which the people commonly understood the words to have when the provision was adopted. *Boone County,* 631 S.W.2d at 324; *Cason,* 507 S.W.2d at 408. The commonly understood meaning of words is derived from the dictionary. *Boone County,* 631 S.W.2d at 324.
>
> * * *
>
> Every word in a constitutional provision is presumed to have effect and meaning. *McNary,* 636 S.W.2d at 335. The word "revenue" is not defined in any of these sections [of the Hancock Amendment]; therefore, it will be accorded its plain, ordinary, and natural meaning as found in the dictionary. "Revenue" is defined as "the annual or periodical yield of taxes, excises, customs, duties, and other sources of income that a nation, state or municipality collects and receives into the treasury for public use. . . ." Webster's Third New International Dictionary 1942 (1964).

Based on the common, ordinary definitions upon which this Court relied in *Buechner,* it is apparent that "total state revenue" is the sum (total) of "taxes, excises, customs, duties, and other sources of income" the state receives into its treasury in a given fiscal year. Except as to "credits not related to actual tax liabilities," this is a cash basis accounting definition because it

requires actual receipt of the revenue by the state. Moneys not paid into the treasury, *see* Mo. Const. art. IV, sec. 15 (defining nonstate funds), or not received in the fiscal year in question are not part of "total state revenues."

The Court's interpretation of "total state revenues" in *Buechner* is consistent with time-honored principles of constitutional construction. It resolves all accounting controversies surrounding the meaning of total state revenues. It also renders the meaning of "total state revenues" sufficiently precise as to permit enforcement. Section 18(a) does not violate due process.

B.

The constitution defines "personal income of Missouri" as the total income received by persons in Missouri from all sources, as defined and officially reported by the United States Department of Commerce or its successor agency." Mo. Const. art. X, sec. 17(2). Appellants concede that the Department of Commerce publishes the calculation to which section 17(2) refers. They complain, however, that the figure is constantly updated over the course of years as more information becomes available to the Commerce Department. As a result, appellants argue, the true amount of income received by persons in Missouri can never be precisely known. Significantly, appellants do not attack the government's selection of a particular Commerce Department report calculating personal income of Missouri.

The purpose of the tax and spending limitations contained in the Hancock Amendment is not thwarted if the calculation of the revenue limit is not accurate to the mill. The definition of "personal income of Missouri" contained in section 17(2) erects a sufficiently definable standard to permit those who wish to enforce the revenue limit to do so.

III.

The judgment of the trial court is affirmed. The stay previously entered by the trial court is dissolved.

EDWARD D. ROBERTSON, JR.
JUDGE

All concur.

APPENDIX B

CLERK OF THE SUPREME COURT

STATE OF MISSOURI
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THOMAS F. SIMON
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January 27, 1998

Mr. Lewis C. Green
Mr. Bruce A. Morrison
Ms. Kathleen G. Henry
Suite 1830
314 North Broadway
St. Louis, Missouri 63102

Ir re: Missourians for Tax Justice Education Project, et al. vs. Bob Holden, et al. Supreme Court No. 79708

Dear Counsel:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled."

Yours very truly,

THOMAS F. SIMON

/s/Christina S. Vinson
Deputy Clerk, Court en Banc

cc: Mr. James R. Layton, Chief Deputy Attorney General

APPENDIX C

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

DIVISION II

No. CV196-1098CC

MISSOURIANS FOR TAX JUSTICE EDUCATION PROJECT,et al.,
Plaintiffs,

v.

BOB HOLDEN, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Findings of Fact

1. Plaintiffs Larry C. Gaines and LaVonne Shinn are residents of the State of Missouri. During fiscal 1995 (July 1, 1994 to June 30, 1995) plaintiffs Gaines and Shinn paid Missouri state sales taxes and other state taxes, but did not pay any Missouri income tax or report any Missouri income tax liability on individual income tax returns filed during fiscal 1996.

2. Plaintiff Missourians for Tax Justice Education Project, Inc. ("MTJEP") is a corporation organized and existing under the general not-for-profit corporation laws of the State of Missouri, with its principal office and place of business in the State of Missouri. Plaintiff Missouri Association for Social Welfare ("MASW") is a not-for-profit corporation organized as a pro forma decree corporation under the Missouri corporation laws, with its principal place of business in the State of Missouri. During fiscal 1995 (July 1, 1994 to June 30, 1995) plaintiffs MTJEP and MASW paid Missouri state sales taxes and other

state taxes, but did not pay any Missouri income tax or report any Missouri income tax liability on corporate income tax returns filed during fiscal 1996.

3. Defendants are Mel Carnahan, the duly elected Governor of Missouri; Richard Hanson, the duly appointed Commissioner of Administration of Missouri; Bob Holden, the duly elected State Treasurer; and Janette Lohman, the duly appointed Director of Revenue.

4. The Office of Administration has determined that for fiscal 1995, the "total state revenue" as defined in Article X, § 17(1), exceeded the revenue limit established by Article X, § 18(a) of the Missouri Constitution, by approximately $147 million ("the excess revenue").

5. Pursuant to Article X, § 18(b) and Senate Bill No. 500, 88th General Assembly, 2d Regular Session, the State of Missouri is required to pay the excess revenue from fiscal 1995 to Missouri income tax payers, based on the income tax liability they reported on Missouri state income tax returns filed during fiscal 1996.

6. The defendants have initiated and are carrying out preparations to pay the "excess revenue" to Missouri income tax payers pursuant to the mandate of Article X, § 18(b) and Senate Bill No. 500, 88th General Assembly, 2d Regular Session.

7. The General Assembly has appropriated approximately $147 million for that purpose in the Conference Committee Substitute for House Bill No. 1004, 88th General Assembly, 2d Regular Session.

8. The "total state revenue" for fiscal 1995, as calculated by defendants, included revenue from many sources. Income taxes paid in fiscal 1995 accounted for somewhat more than half of that

total. Other significant sources of revenue included sales taxes, motor fuel taxes, and use taxes.

9. Of those persons who filed Missouri income tax returns in fiscal 1996 showing that they were liable for Missouri income tax, there are some who neither owed nor paid Missouri income tax during fiscal 1995. The defendants are nonetheless preparing to pay to those taxpayers a refund based on a proportional share of the "excess revenue" pursuant to Article X, § 18.

10. Pursuant to Article X, § 18(a) of the Missouri Constitution, those persons who paid sales, use, motor fuel, cigarette or other state taxes or fees during fiscal 1995, but who did not file Missouri income tax returns during fiscal 1996 showing income tax liability, will not receive any of the "excess revenue" that defendants are preparing to pay to Missouri income taxpayers to be refunded.

11. Missourians in the lowest income brackets who do not incur any net income tax liability pay a larger percentage of their gross income in sales taxes than do Missourians in higher income brackets. But those in higher income brackets pay a greater amount of sales taxes than those in the lowest brackets—in addition to paying the income taxes that these plaintiffs have been able to avoid. Furthermore, those Missourians in the lowest income brackets who incur no net income tax liability receive transfer payments and other subsidies such as food stamps and the earned income tax credit which allow them to consume far in excess of their stated gross income. Defendants' Exhibit A.

12. The procedure that the defendants use to comply with the requirements of Article X, § 18, and S.B. 500 is: (1) determine the amount of excess revenue; (2) determine the total amount of income tax liability for annual returns filed during Fiscal year 1996; (3) divide each income taxpayer's paid income tax liability for annual returns filed during Fiscal Year 1996 into the total

amount of paid income tax liability for annual returns filed during Fiscal Year 1996, thus deriving a percentage or ratio; (4) apply that percentage or ratio to the total amount of excess revenue to establish the amount of each income taxpayer's refund; (5) prepare and mail a check to each such income taxpayer for that amount. For the excess revenue received during fiscal 1995, steps 1 through 4 are completed; step 5 was not completed because of the temporary restraining order entered by this Court.

13. The defendants will send out approximately 2 million payment checks pursuant to the procedure outlined above. Taxpayers with families and those filing joint returns will receive one check, so that the number of persons actually benefiting from the payments will be greater than the number of payment checks sent. The payments will amount to approximately five per cent of the income tax liability reported on each recipient's last return filed during fiscal 1996. The median payment to those individuals who paid Missouri income tax will be approximately $41. The median income tax liability for those individuals who paid income tax during Fiscal Year 1996 was $677. The median taxable income of those individuals paying Missouri income tax during fiscal year 1996 was $29,000.

14. Since § 18 became effective in 1981, all governors of Missouri—governors Bond, Ashcroft, and Carnahan—have interpreted the terms "total state revenue," "revenue limit," and "personal income of Missouri" for any in calendar year in a consistent fashion. Throughout that period, the State Auditors—Auditors Antonio and Kelly—did not dispute the governors' interpretation of the terms "personal income of Missouri" and "revenue limit." Since 1993, Auditor Kelly has, however, disagreed with the governors' and auditors' prior interpretations of the term, "total state revenue." Exhibit 5, Auditor's Report for Year Ending June 30, 1995, Pages 38-39.

Conclusions of Law

The plaintiffs challenge the constitutionality of Article X, §§ 18(a) and (b) of the Missouri Constitution, provisions of what is commonly referred to as the Hancock Amendment. The purpose of these provisions is to limit taxation and the growth of state government by limiting the amount of revenue that may be collected and retained by the state in a given fiscal year and mandating that excess revenues collected be "refunded pro rata based on the liability reported on the Missouri state income tax . . . annual returns filed following the close of such fiscal year." Mo. Const. art. X, § 18(b).

In their first amended petition, plaintiffs ask this Court to render both the revenue limit provision and its enforcement mechanism, the refund provision, nullities. Plaintiffs contend that the refund mechanism violates the Equal Protection Clause of the U.S. Constitution and that, in basing refunds on income tax paid rather than giving money back to everyone who paid taxes to Missouri, it constitutes an illegal "taking" of the property of those who did not pay income tax but who did pay other Missouri taxes. Plaintiffs contend that the refund mechanism violates not only the U.S. Constitution, but various provisions of the Missouri Constitution as well. Finally, plaintiffs argue that terms used to determine revenue limits in § 18(a), such as "personal income of Missouri," "total state revenue," and "revenue limit," are so loosely defined as to render that provision void for vagueness. As explained below, the Court finds no merit to plaintiffs' challenges.

As the Missouri Supreme Court has previously observed with respect to the Hancock Amendment, "[s]ince the amendment has . . . been adopted and the people have stated their will, this Court's duty is not to seek to condemn the amendment, but to seek to uphold it if possible." *Buchanan v. Kirkpatrick*, 615 S.W.2d 6. 12 (Mo. banc 1981).

The Court initially notes that plaintiffs' assertion that the challenged provisions violate the very Constitution that they amend are patently meritless. "The 'inherent, sole and exclusive right' of the people to amend, 'alter and abolish their constitution and form of government' is expressly made subject to the provisions that 'such change be not repugnant to the Constitution of the United States.'" *Id.* at 16, quoting Mo. Const. art. I, § 3. The only question, then, is whether the challenged provisions violate the United States Constitution.

In their equal protection challenge of the Hancock Amendment's enforcement mechanism, the refund provision of § 18(b), plaintiffs adopt the positions of Judges Morgan and Rendlen of the Missouri Supreme Court that the refund mechanism favors the relatively wealthy over the relatively poor by paying out excess revenues only to income taxpayers and not proportionally to all payers of Missouri taxes. *See Buchanan v. Kirkpatrick*, 615 S.W.2d at 16-17; *Buechner v. Bond*, 650 S.W.2d 611, 615-16 (Mo. banc 1993). Plaintiffs contend that § 18(b) impermissibly creates and disparately treats two classes of taxpayers: (1) those who paid income taxes for calendar year 1995, and (2) all other taxpayers. Plaintiffs point out that some members of the first class did not pay income taxes to Missouri during fiscal year 1995.

Plaintiffs use the first class of taxpayers as a proxy for the relatively wealthy and the second class of taxpayers as a proxy for the relatively poor. The United States Supreme Court has consistently rejected the notion that a "suspect class" can be defined by wealth or income alone. *San Antonio School District v. Rodriquez,* 411 U.S. 1, 28-29 (1973); *Harris v. McRae*, 448 U.S. 297, 322 (1980). Since the Supreme Court has "never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny" (*Rodriquez*, 411 U.S. at 70), § 18(b) will be upheld if it "bear[s] some rational

relationship to a legitimate state end." *McDonald v. Board of Election Commsrs. of Chicago,* 394 U.S. 802, 809 (1969).

The legitimate state end of the Hancock Amendment, as recognized by the Missouri Supreme Court, is "to limit taxes by establishing tax and revenue limits and expenditure limits for the state and other political subdivisions which may not be exceeded without voter approval." *Buchanan v. Kirkpatrick*, 615 S.W.2d at 13. "[T]he objectives of the Hancock Amendment [were] clearly understood by the voters—to rein in increases in governmental revenue and expenditures." *Roberts v. McNary*, 636 S.W.2d 332, 336 (Mo. banc 1982). As the Missouri Supreme Court also observed, the "provisions relating to the repayment of excess revenues collected are properly connected to the single controlling purpose of the amendment: to limit taxes and governmental expenditures within the state of Missouri." *Buchanan v. Kirkpatrick*, 615 S.W.2d at 14.

The testimony of plaintiffs' own expert supports this conclusion. While noting that the second largest tax in Missouri is the sales tax, he conceded that sales taxes cannot, as a practical matter, be refunded pro rata to those who paid them. While plaintiffs expert was able to name a few other taxes besides the income tax that could be attributed to particular individuals and thus refunded to them, refunding those taxes would be of little or no benefit to plaintiffs. More importantly, the availability of other means of reducing excess revenues does not render § 18(b)'s income tax refund scheme unreasonable. Plaintiffs' expert conceded, and this Court holds, that selecting the income tax from among the panoply of state taxes on which refunds could be based was a rational choice.

Plaintiffs complain that the mismatch between the fiscal year, from which excess revenue is calculated, and the income tax year (which for individuals is a calendar year), from which refunds

are calculated, is infirm because some income taxpayers will receive refunds although they did not contribute to excess revenue. This does not render the refunds irrational as a means of enforcing the Hancock Amendment's tax and spending lid. For one thing, the only state taxes that can be directly correlated with the state's fiscal year are consumption taxes, and refunding them is impossible. Refunding income taxes is not only possible, it succeeds in achieving the purpose of the amendment. Furthermore, although § 18(b) speaks of refunds of excess revenues, these refunds could just as easily be characterized a recalculation of income tax liability to offset excess revenues. It is unclear how a redetermination of income tax rates, whatever the reason for it, can support any claim of disparate treatment by those who do not even pay any income tax at all.

Which leads to plaintiffs' argument that the refunds of § 18(b) are a "taking" from the poor for the benefit of the rich. There is no factual support for this contention. Income taxpayers will not receive anything in excess of what they have already paid in income taxes. And, like plaintiffs, they will receive no portion of consumption taxes that they have paid.

Plaintiffs cite no authority, and the Court finds none, stating that plaintiffs must be given "due process" before tax rates applied to someone else are changed. However, even if plaintiffs' characterization were correct, that the refunds are a transfer of benefits from non-income taxpayers to income taxpayers, plaintiffs would be no more entitled to due process than would income taxpayers whose taxes are used to subsidize the poor with food stamps and other transfer payments. The Court notes that those Missourians with the lowest levels of gross income have levels of consumption in excess of that income thanks to these very types of transfer payments. To find a due process violation in the subsidization of one citizen through taxes paid by another would be far more harmful than helpful to plaintiffs.

Ironically, since the Hancock refunds are themselves largely taxable by the federal government, they constitute yet another source of funding for transfer payments to the poor.

In any event, the question of relative tax burden is one suited for legislative rather than judicial action. As the United States Supreme Court asked rhetorically, "But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or who can insure in this respect absolute equality of burdens, and fairness in their distribution among those who must bear them?" *Kelly v. Pittsburgh*, 104 U.S. 78, 82 (1881). It is not the courts, as they have "consistently refused . . . to undertake the task of passing on the 'reasonableness' of a tax that otherwise is within the power . . . of state legislative authorities." *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 373 (1974).

Plaintiffs' final attack on § 18 is that various critical terms such as "total state revenue" are so vague that the whole tax and spending limit is unenforceable. The Court is unaware of any instance in which a constitutional provision has ever been declared void for vagueness. While a statute may be unconstitutionally vague if it fails to give a person of ordinary intelligence fair notice that his or her conduct is forbidden, or if its standards lack sufficient specificity to prevent arbitrary enforcement, *e.g. State v. Stone*, 926 S.W.2d 895, 899 (Mo.App., W.D. 1996), the constitutional provisions in question do not proscribe individual conduct or threaten individuals with any sort of penalty. Rather, they regulate governmental taxation and spending and thus are not subject to attack for vagueness.

Notably, plaintiffs do not contend that the defendants' actions are inconsistent with the dictates of the Hancock Amendment. Nor do they point to any variation in interpretation from any of three governors over the course of fifteen year that would suggest some difficulty in applying § 18(a). Nor do they suggest

why the legislature might be precluded from answering questions about the Hancock Amendment, if addition detail were needed. In fact, they do not question the validity of the enactment and application of Senate Bill No. 500, 88th General Assembly, 2d Regular Session, which provides such clarification for other aspects of § 18.

Despite the ability of some to point out alternative approaches to applying § 18(a), this Court holds that § 18(a) is sufficiently defined to meet constitutional standards.

ORDER AND JUDGMENT

WHEREFORE, it is ORDERED, ADJUDGED and DECREED:

Plaintiffs' request for declaratory and injunctive relief is DENIED.

It is further ORDERED, ADJUDGED and DECREED that plaintiffs' request for an award of expenses of litigation, including attorney's fees and costs, is DENIED.

Dated: 1-6-97 /s/Byron L. Kinder, Judge

APPENDIX D

CLERK OF THE SUPREME COURT

STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

TELEPHONE
(573) 751-4144

February 2, 1998

Mr. Lewis C. Green
Mr. Bruce A. Morrison
Ms. Kathleen G. Henry
314 North Broadway, Suite 1830
St. Louis, Missouri 63102

In Re: Missourians for Tax Justice Education Project, Inc., et al.
vs. Bob Holden, et al.
Missouri Supreme Court No. 79708

Dear Counsel:

Pursuant to my conversation with Mr. Green on January 30, 1998, the mandate in this cause issued on January 29, 1998. Therefore, there is no case pending before the Court in which to file Appellant's motion for stay pending certiorari proceedings. Your pleadings received by this office on January 30, 1998, are returned to you with this letter.

Very truly yours,

THOMAS F. SIMON

/s/Cynthia L. Turley
Deputy Clerk, Court en Banc

cc:
Missouri Attorney General/Mr. James R. Layton

APPENDIX E

IN THE CIRCUIT COURT OF COLE COUNTY,
STATE OF MISSOURI

DIVISION TWO

No. CV196-1098CC

MISSOURIANS FOR TAX JUSTICE EDUCATION PROJECT, INC., et al.,
Plaintiffs-appellants,

v.

BOB HOLDEN, et al.,
Defendants-respondents.

PLAINTIFFS' MOTION FOR STAY PENDING CERTIORARI PROCEEDINGS

Come now plaintiffs and show:

1. On January 28 appellants' counsel was notified by the Clerk that, on January 27, 1998, the Court had overruled appellants' motion for rehearing. On January 29 plaintiffs dispatched a motion for stay to the Supreme Court. On January 30, the Supreme Court Clerk telephoned to say that the mandate had issued on January 29, and the motion could not be filed.

2. Plaintiffs have been informed that, unless stayed, the state will commence mailing the "excess revenues" for 1995 and 1996 on Monday, February 2, to income taxpayers, although the Department of Revenue now concedes that only 43% of the "excess revenues" were generated from Missouri income taxes. After the checks have been mailed, it will be virtually impossible to restore the status quo.

3. Plaintiffs have been advised by counsel that the ruling of this Court is appropriate for review by the United States

Supreme Court. Plaintiffs are actively considering the filing of a petition for certiorari. That petition is to be filed no later than ninety days after January 27, 1998. Rule 13, U.S. Sup. Ct. Rules.

WHEREFORE, appellants pray that this Court stay the mailing of refund checks pending certiorari proceedings, or if no petition for certiorari is timely filed, until April 27, 1998.

/s/Lewis C. Green

Lewis C. Green (Mo. Bar # 14547)
Bruce A. Morrison (Mo. Bar # 38359)
Kathleen G. Henry (Mo. Bar # 39504)
Green, Hennings & Henry
314 North Broadway, Suite 1830
St. Louis, Missouri 63102
(314) 231-4181, Facsimile 231-4184
Attorneys for plaintiffs

PROOF OF SERVICE

The undersigned certifies that a complete copy of the foregoing was served upon defendants' attorney of record by enclosing the same in an envelope addressed to him, as set forth below, with first-class postage fully prepaid, and by depositing said envelope in a United States post office mail box in St. Louis, Missouri, on the 30th day of January, 1998.

James R. Layton, Esq.
Chief Deputy Attorney General
Office of Attorney General
P.O. Box 899
Jefferson City, Missouri 65102

/s/Lewis C. Green

DEFENDANT'S EXHIBIT A 9-25-96 KDH

MISSOURI ESTIMATES USING U.S. DATA

Prepared by Craig L. Israelsen, Ph.D. University of Missouri

Income Percentiles by 5% Increments	Gross Income	Take-home pay percentage	Net Income	Total Expenditures	Sales Tax Paid	Taxable Income %	[--------Missouri--------] Taxable Income	Tax Rate	Income Tax Paid	Hancock Refund .05	Sales Tax as a Percentage of... Gross	Net	Total Expenditure
Lowest to the 5th	$4,113	1.00	$4,113	$12,086	$438	.00	$0	0	$0	$0	10.6%	10.6%	3.6%
10th	$6,518	1.00	$6,518	$13,459	$489	.00	$0	0	$0	$0	7.5%	7.5%	3.6%
15th	$8,923	1.00	$8,923	$14,832	$541	.70	$6,246	.0267	$167	$8	6.1%	6.1%	3.6%
20th	$11,329	.98	$11,102	$16,206	$592	.70	$7,930	.0311	$247	$12	5.2%	5.3%	3.7%
25th	$13,734	.95	$13,047	$17,579	$644	.70	$9,614	.0347	$334	$17	4.7%	4.9%	3.7%
30th	$16,139	.93	$14,929	$18,952	$695	.70	$11,297	.04	$452	$23	4.3%	4.7%	3.7%
35th	$19,249	.90	$17,324	$20,671	$768	.70	$13,474	.0415	$559	$28	4.0%	4.4%	3.7%
40th	$22,359	.88	$19,564	$22,390	$842	.70	$15,651	.0425	$665	$33	3.8%	4.3%	3.8%
45th	$25,468	.85	$21,648	$24,108	$915	.70	$17,828	.044	$784	$39	3.6%	4.2%	3.8%
50th	$28,578	.83	$23,577	$25,827	$988	.70	$20,005	.0468	$936	$47	3.5%	4.2%	3.8%
55th	$32,793	.80	$26,235	$27,956	$1,064	.65	$21,316	.048	$1,023	$51	3.2%	4.1%	3.8%
60th	$37,009	.78	$28,682	$30,085	$1,140	.65	$24,056	.05	$1,203	$60	3.1%	4.0%	3.8%
65th	$41,224	.75	$30,918	$32,213	$1,215	.65	$26,795	.051	$1,367	$68	2.9%	3.9%	3.8%
70th	$45,439	.73	$32,943	$34,342	$1,291	.60	$27,263	.053	$1,445	$72	2.8%	3.9%	3.8%
75th	$56,663	.70	$39,664	$39,846	$1,505	.60	$33,998	.055	$1,870	$93	2.7%	3.8%	3.8%
80th	$67,887	.68	$45,823	$45,351	$1,719	.60	$40,732	.057	$2,322	$116	2.5%	3.8%	3.8%
85th	$79,110	.65	$51,422	$50,855	$1,933	.55	$43,511	.06	$2,611	$131	2.4%	3.8%	3.8%
90th	$90,334	.63	$56,459	$56,359	$2,147	.55	$49,684	.06	$2,981	$149	2.4%	3.8%	3.8%
95th	$101,558	.60	$60,935	$61,863	$2,361	.50	$50,779	.06	$3,047	$152	2.3%	3.9%	3.8%
96th to the 100th	$112,782	.60	$67,669	$67,368	$2,575	.50	$56,391	.06	$3,383	$169	2.3%	3.8%	3.8%

Data source:

Consumer Expenditure Survey, U.S. Dept. of Labor, Dept. of Labor Statistics, Report 904

1st Quarter 1995

**** Note: Expenditures exceed income in the lower income brackets. This is, in part, due to transfer payments and subsidizations. In the higher income brackets, spending in excess of net income represents the creation of indebtedness.